Supreme Court, U.S.
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In The
# Supreme Court of the United States

MARALYN S. JAMES,

*Petitioner,*

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY NASHVILLE PUBLIC LIBRARY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the decision of the Sixth Circuit which is inconsistent with this Court's subsequent decision in *Burlington N. & S.F.R. Co. v. White,* 548 U.S. ___, No. 05-259, slip op. 1-18 (June 22, 2006) should be remanded to the Sixth Circuit for reconsideration.

2. Whether an employer may be held liable for retaliatory discrimination under Title VII by depriving the employee of her career and the opportunity to draw her full service pension after she made complaints of age and disability discrimination.

## LIST OF PARTIES

Parties to the proceeding include the two parties listed in the caption.

## CORPORATE DISCLOSURE STATEMENT

Petitioner is a private individual.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Maralyn S. James respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## ORDERS ENTERED IN THE CASE

The District Court entered Petitioner's jury verdict on May 17, 2004 and it is reproduced at Petitioner's Appendix 13.

The District Court entered its order denying the Government's Rule 50 motion on June 17, 2004, reproduced at Petitioner's Appendix 12.

The Court of Appeals for the Sixth Circuit entered its initial decision reversing James' jury verdict on December 14, 2005, Court of Appeals Opinion, *James v. Metropolitan Government of Nashville and Davidson County Nashville Public Library,* No. 04-5874 (6th Cir. December 14, 2005) reproduced at Petitioner's Appendix 1-11.

On April 14, 2006, the Court of Appeals denied both the petition for rehearing and the petition for rehearing en banc and entered an unpublished order reproduced at Petitioner's Appendix ("App."), 15-16.

## BASIS FOR SUPREME COURT JURISDICTION

Petitioner seeks review of the Sixth Circuit's original order entered December 14, 2005 and the Sixth Circuit's denial of the petition for rehearing entered on April 14,

2006. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

## STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-3(a) Other unlawful employment practices, provides:

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

## STATEMENT OF THE CASE

This case is a section 704(a) retaliation case decided by the Sixth Circuit prior to this Court's decision in *Burlington*

*N. & S.F.R. Co. v. White*, 548 U.S. ___, No. 05-259, slip op. 1-18 (June 22, 2006). The jury found retaliation in violation of Title VII and awarded the petitioner $43,000 in damages. App. 13. The employer appealed on the sole issue of whether the petitioner had suffered an adverse employment action. App. 5, 12.

On December 14, 2005, the Sixth Circuit reversed, holding that the retaliation inflicted on the petitioner did not meet the Sixth Circuit's narrow interpretation of section 704(a). App. 7, citing *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002) (citation omitted). Maralyn S. James ("James") filed a petition for rehearing en banc or, in the alternative, for rehearing by the original panel. On April 14, 2006, at approximately the same time that *Burlington Northern & Santa Fe Railway Co. v. White* was argued before this Court, the Sixth Circuit denied James' petition for rehearing.

Petitioner asks this Court to grant certiorari, vacate the Sixth Circuit's opinion and remand for reconsideration in light of *Burlington Northern & Santa Fe Railway Co. v. White*, slip op. 1-18.[1]

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[1] On June 30, 2006, in light of the *Burlington Northern* decision, this Court remanded the following cases:

*Jordan v. Chertoff*, No. 05-1233 (U.S. 2006).

*Cavicchi v. Chertoff*, No. 05-770 (U.S. 2006).

*Thomas v. Potter*, No. 05-1267 (U.S. 2006).

*McAdams v. Harvey*, No. 05-683 (U.S. 2006).

*Scurlock-Ferguson, Vester K. v. Durham, NC*, No. 05-10032, 2006 WL 816741 (U.S. June 30, 2006).

*Garner, Donald v. Ashley Furniture Industries*, No. 05-507, 2006 WL 1788317 (U.S. June 30, 2006).

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 1331, federal question jurisdiction with a violation of the discrimination laws including 42 U.S.C. § 2000e-2(a) and 3(a).

James was an "outstanding" thirty-year Civil Service employee at the employer's Public Library who developed a medical condition diagnosed as a "mild cognitive dysfunction relating to stress at work" and could not meet the quotas set for the book cataloging aspect of her job as Librarian II. App. 1-2. Even though James' problems with speed in cataloging had been documented as early as 1996, the employer did not take any steps to suspend, demote or terminate James or to discipline her in any way until after James complained of discrimination. App. 2, 3. Immediately after James made a charge of age and disability discrimination, the employer took numerous retaliatory actions aimed toward demoting or terminating her. App. 1-11.

First, the employer completely ignored James' medical restrictions. App. 3-4. James' physician had notified the employer that she was "to limit stress at work, specifically no overtime and working at a pace consistent with her abilities due to her medical condition." App. 2. In spite of the restrictions, the employer insisted that James increase her cataloging speed or be terminated. App. 3.

James then applied for lateral transfers to two other available Librarian II positions which had no cataloging quotas and which, according to the Library Director, she was capable of performing. App. 3; II Tr. 180. The employer retaliated again by making a decision, recorded in writing, to resist James' lateral transfer and demote her to the status of a newly hired librarian. App. 4; II Tr. 185-186,

Trial Exhibit 23. In effecting that decision, the employer even refused to allow James an interview for the Librarian II jobs even though she was ranked Number 1 in the list of applicants for one of the two positions. App. 2-3.

As her cataloging speed increased but her medical condition worsened because of the employer's constant reprimands, James' physician ordered James to stop cataloging and placed her on medical leave. App. 3-4. The employer advised James that if she did not accept a demotion to a Librarian I position she would be charged as absent without leave and subject to disciplinary action. App. 4. If James accepted the demotion to a Librarian I job, she would be on probation and would lose her seniority. I Tr. 113; II Tr. 155, 194-195.

In an effort to avoid demotion or termination, James applied for disability benefits. App. 4. The employer's normal practice was to encourage such applications when an employee developed medical restrictions and could not perform her job. III Tr. 350-353, 360. The Chairman of the Benefit Board gave uncontradicted evidence that, if the employer had supported James in her disability application, she would have been approved for the disability benefits. III Tr. 354.

As another retaliatory act leading to James' loss of her career, the employer disregarded its routine practice and fought James' application for disability benefits with a vengeance and with success. App. 4. James thereby lost her opportunity to ever draw a full service pension. III Tr. 355, 357, 382, 442-443. At the time of trial, she no longer had her career and she was drawing a smaller early service pension. App. 8.

A few months prior to the James' decision, the Sixth Circuit, sitting en banc in *White v. Burlington Northern & Santa Fe Rail Co.,* 364 F.3d 789, 799 (6th Cir. 2004), had rejected the EEOC's reality based definition of adverse employment actions in Title VII retaliation cases. That definition set forth in the EEOC Guidelines is "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." *Burlington N. & S.F.R. Co. v. White,* slip op. 11. In rejecting the EEOC definition, the Sixth Circuit clung to the definition it had adopted in *Hollins v. Atlantic Co.*, a "materially adverse change in the terms and conditions of [plaintiff's] employment." *Id.* at 795, 800; quoting 188 F.3d 652, 662 (6th Cir. 1999).

The Sixth Circuit also held that its restrictive definition of adverse employment actions applied "equally to all Title VII discrimination claims, not only to retaliation claims." *Id.* at 799 citing *Morris v. Oldham County Fiscal Court,* 201 F.3d 784, 791-92 (6th Cir. 2000) (applying rules of statutory construction to hold that "discriminate against" means the same thing each time it appears in Title VII); *Mattei v. Mattei,* 126 F.3d 794, 806 (6th Cir. 1997) (presuming that Congress intended the phrase "discriminate against" to have the same basic meaning each time it is used in a statute).

This Court has now rejected the Sixth Circuit definition of Title VII adverse employment actions as a "stringent interpretation of the anti-retaliation provision (the interpretation that limits Section 704 to the same employment-related conduct forbidden by Section 703)." *Burlington N. & S.F.R. Co. v. White,* slip op. at 12, 15.

This Court explained that "such a limited construction would fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms.'" *Id.* slip op. at 9 quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

This Court further held in rejecting the Sixth Circuit standard that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington N. & S.F.R. Co. v. White,* slip op. at 9, 15-16.

In addressing the scope of the Title VII anti-retaliation provision, this Court explained that "the significance of any given act of retaliation will often depend upon the particular circumstances." *Id.*, slip op. at 14. Each retaliation case must be considered on its own individual facts, recognizing the importance of the "constellation of surrounding circumstances, expectations and relationships" as sanctioned in an earlier decision. *Id.* citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998).

This Court suggested that an "act that would be immaterial in some situations is material in others." *Id.* citing *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005). For instance, "[a] schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* citing *Washington* at

662 (finding flex-time schedule critical to employee with disabled child).

In James' case, the Sixth Circuit summarily dismissed the many acts of James' employer as not being adverse actions, without focusing on the significance of each act within the context of James' situation to see if the act was material and caused James harm inside or outside the workplace. See *Burlington N. & S.F.R. Co. v. White,* slip op. at 14-15; App. 7-9. And, the Sixth Circuit did not consider whether the acts of James' employer would have dissuaded a reasonable employee from complaining of discrimination.

Under this Court's standard, many of the acts of James' employer produced harm to James. *Id.*, slip op. at 13. For instance, the intentional failure to interview James and transfer her to a job that she could perform with her medical restrictions was just one of those material adverse actions sufficient to sustain her verdict.

## ARGUMENT

### REASONS FOR GRANTING THE PETITION

### THE DECISION OF THE SIXTH CIRCUIT COURT WAS ISSUED PRIOR TO, AND APPLIED A STANDARD INCONSISTENT WITH, THIS COURT'S DECISION IN *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE.*

This petition should be granted and the case remanded because the Sixth Circuit's decision conflicts with this Court's decision in *Burlington N. & S.F.R. Co. v.*

*White*, 548 U.S. ___, slip op. at 9 (June 22, 2006); Rules of the Supreme Court of the United States, Rule 10(c).

Prior to deciding James' case, the Sixth Circuit had rejected the EEOC standard for an adverse employment action in Title VII retaliation cases, explicitly stating that "[w]e therefore reject White's and the EEOC's request that we adopt a new definition of adverse employment action for purposes of Title VII retaliation cases, and we reaffirm the definition that we have developed in cases such as *Kocsis* and its progeny." *White v. Burlington Northern & Santa Fe Rail Co.*, 364 F.3d at 800; *Kocsis v. Multi-Care Management Inc.*, 97 F.3d 876, 885-887 (1996). Further, the appellate court promised that "we will continue to define the exception narrowly so as not to frustrate the purpose of Title VII while deterring lawsuits over trivial matters." *Id.*

That Sixth Circuit standard, which required the employee to show a "materially adverse change in the terms or conditions of employment because of [the] employer's conduct," and which was applied in James' case, has been rejected by this Court as a "limited" and "stringent interpretation of the anti-retaliation provision." *Burlington N. & S.F.R. Co. v. White*, slip op. at 15; see App. 7 citing *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002) (citation omitted).

This Court has adopted a standard almost identical to the EEOC standard rejected by the Sixth Circuit. If the standard now approved by this Court had been applied to the James case, the jury verdict would have been upheld. Many of the employer's acts, after James made complaints

of discrimination, were harmful enough to fall within the reach of section 704(a), Title VII's anti-retaliation provision.

## CONCLUSION

This Court should grant certiorari, vacate the decision of the Sixth Circuit, and remand this case for reconsideration in light of the Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White.*

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | | |
|---|---|---|
| Maralyn S. James,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>Metropolitan Government of Nashville and Davidson County Nashville Public Library,<br><br>Defendant-Appellant. | ) | **ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE<br><br>**OPINION** |

**Before: GILMAN and COOK, Circuit Judges, and MILLS, District Judge.***

**RICHARD MILLS, District Judge.**

## I. HISTORY

The Metropolitan Government of Nashville and Davidson County operates the Nashville Public Library (collectively "the Government"). Maralyn James began working for the Library in 1971 as a "Librarian I," acquiring records, raising funds, cataloguing materials, and performing other tasks. From 1971 to 1994, James received performance ratings primarily of "outstanding" and "above average."

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* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

In 1994, the Library transferred James to its main branch and promoted her to "Librarian I-and-a-half." In 1996, James received a negative performance evaluation with respect to the speed of her work. She knew that she was not cataloguing materials as quickly as her coworkers.

In July 1999, James became a "Librarian II" via a reclassification of library job titles. Her responsibilities remained unchanged and the speed of her work remained unsatisfactory. Performance evaluations from 1996 through 2001 consistently criticized James' output. For instance, James' 1999 performance evaluation noted that she was cataloguing "just over 2 titles per hour (as opposed to the 7-8 expected) . . . Continued low output in her primary job responsibility is not acceptable and will have serious consequences if the situation is not corrected."

On October 1, 2001, James' supervisor, Linda Neff, gave James a deadline to catalogue a collection of books. James considered the deadline unfair and the resulting stress led her to seek medical attention for headaches and high blood pressure. James' doctor, Michael Callaway, M.D., advised her to take several days off work. He also sent the Library a letter notifying it that James was "to limit stress at work, specifically no overtime and working at a pace consistent with her abilities due to her medical condition." Dr. Callaway later diagnosed James as having "mild cognitive dysfunction relating to stress at work."

On October 3, James wrote a letter complaining that she was being subjected to "harassment" and a "hostile work environment." James requested a transfer because the hostility was detrimental to her health. One of the letter's recipients, Library Director Donna Nicely, called James into her office on October 9 to discuss James' complaint.

Supervisors Suliang Feng and Chase Adams were present at the meeting. Adams told James "if you will just volunteer to take a demotion, this will all be over with." James did not volunteer to take a demotion and the Library did not approve her transfer. The Library investigated her complaint and on October 31, 2001, concluded it had no merit.

By the end of 2001, James' poor productivity caused her to fail an annual evaluation. The Library advised James that she would be fired if her productivity did not improve. On January 29, 2002, James filed an EEOC charge against the Government alleging age discrimination, disability discrimination, and retaliation. She received a "right to sue letter" on January 31, 2002. That same day, James submitted a letter seeking a lateral transfer to "Librarian II-audio visual." Despite being ranked first on the list of applicants, James did not receive an interview.

The Library scheduled a performance re-evaluation for James on March 1, 2002, but the re-evaluation was postponed for a month at James' request. By April 1, James was unable to catalogue an average of 6 items per hour, a goal the Library had given her. The Library did not discipline James. Instead, it gave her time to improve her productivity and offered to assist her in that regard. To that end, the Library accommodated James' request to adjust lights around her computer and provide her with special computer glasses. The Library also offered techniques for James to improve her output.

James filed a second retaliation claim with the EEOC and received a "right to sue" letter on April 16, 2002. She

sued the Library and the Metropolitan Government of Nashville and Davidson County on April 30, 2002.

The Library gave James until May 16, 2002, to increase her catalogue average to 6 items per hour. By May 9, James was averaging 5.75 items per hour. However, on May 13, 2002, James' neurologist, Dr. Alan Bachrach, informed the Library that James could not return to her job because she could not keep up with the quotas. That same day, James wrote the Government's benefits department to say that if the Library did not accommodate her with a position at her current level of Librarian II, she would apply for a disability pension.

In June 2002, the Library offered to transfer James to a Librarian I position. James refused the demotion and applied for a disability pension. On November 19, 2002, the Library informed James that if she did not accept a demotion she would be charged as absent without leave and subject to disciplinary action.

The Library informed the Benefits Board that it "offered to accommodate [James] at a lesser position with current salary." However, the Library did not disclose that the salary for the lesser position would, after three months, be reduced to a level that was less than James' Librarian II salary. Because the Library said it could accommodate James, the Benefits Board rejected her claim for a disability pension on April 2, 2003. James sought reconsideration, which was also denied.

James received her last paycheck in March 2003. When she noticed that her family health insurance premium had not been deducted, she immediately notified the Government. James took a $209.20 personal check to the Government's payroll department to pay her premium.

She continued to make payments each month her disability pension appeal was pending. In late July 2003, James received a letter from CIGNA cancelling her family health insurance due to non-payment of premiums. However, the letter was a mistake and the insurance was never cancelled. She took an early service pension and terminated her employment on or about March 1, 2003.

James sued the Government on April 30, 2003, alleging claims under the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12111, *et seq.*, the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621, *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The district court dismissed the ADA and ADEA claims on summary judgment and James proceeded to trial on her Title VII hostile work environment and retaliation claims. On May 14, 2003, the jury found the Government liable for retaliation and awarded James $42,000 in compensatory damages. The Government moved to have the verdict set aside under Federal Rule of Civil Procedure 50(a), claiming that the evidence did not show that James had suffered an adverse employment action. The district court denied the Government's motion.

## II. STANDARD OF REVIEW

This Court reviews a district court's denial of a motion for judgment as a matter of law *de novo*. *Estate of Riddle ex rel. Riddle v. Southern Farm Bureau Life Ins. Co.*, 421 F.3d 400, 408 (6th Cir. 2005). The Court views the evidence in the light most favorable to the nonmoving party. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001). It will affirm the jury's verdict unless there was "no legally sufficient evidentiary basis for a

reasonable jury to find for [the prevailing] party." *See* Fed.R.Civ.P. 50(a).

## III. ANALYSIS

"In an action under Title VII, the plaintiff may prove unlawful retaliation by presenting direct evidence of such retaliation or by establishing a *prima facie* case under the *McDonnell Douglas* framework." *Abbott v. Crown Motor Co.*, 348 F.3d 537, 542 (6th Cir. 2003) (referring to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). To do this, a plaintiff must prove that: (1) plaintiff engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took an adverse employment action against the plaintiff, *or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor*; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000) (emphasis in original) (citations omitted). "If and when a plaintiff has established a prima facie case, the burden of production of evidence shifts to the employer to 'articulate some legitimate, nondiscriminatory reason' for its actions." *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802). The plaintiff must then demonstrate "that the proffered reason was not the true reason for the employment decision." *Id.* (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). The employer may also prove an affirmative defense to retaliatory harassment by a supervisor by demonstrating: "(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and

(b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise." *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998).

### *A. Adverse Employment Actions*

"An adverse employment action is a 'materially adverse change in the terms or conditions of . . . employment because of [the] employer's conduct.'" *Policastro v. Northwest Airlines, Inc.,* 297 F.3d 535, 539 (6th Cir. 2002) (citation omitted). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Ford v. Gen. Motors Corp.,* 305 F.3d 545, 553 (6th Cir. 2002) (citation omitted); *see also Kocsis v. Multi-Care Mgmt., Inc.,* 97 F.3d 876, 886 (6th Cir. 1996). A change in employment conditions "must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Kocsis,* 97 F.3d at 886 (citation omitted). *De minimis* employment actions, such as "[r]eassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions." *Policastro,* 297 F.3d at 539.

At trial, James produced evidence of various harms the Government allegedly caused her (*i.e.*, denial of lateral transfers, bad employment evaluations, imposition of cataloguing quotas, etc.). Those harms are not adverse employment actions. *See Sherman v. Chrysler Corp.,* 47 Fed.Appx. 716, 721-22 (6th Cir. 2002) (unpublished)

(denial of lateral transfer is not an adverse employment action under the ADEA); *Primes v. Reno,* 190 F.3d 765, 767 (6th Cir. 1999) (an unfavorable evaluation without an accompanying adverse employment action, such as a lower wage, is not actionable as a Title VII retaliation claim); *Agnew v. BASF Corp.*, 286 F.3d 307, 10 (6th Cir. 2002) (requiring an employee to comply with a reasonable performance plan or be subject to discipline does not constitute an adverse employment action under the ADEA).

James also contended that the Government's opposition to her disability application, the "cancellation" of her family's health insurance, its "misrepresentation" about paying her the same salary to work a lesser position, and the reduced service pension it paid her are adverse employment actions.[1] James is incorrect in all respects.

In the present case, the Library's failure to support James's disability application was not an adverse employment action because it did not cause a material change in her benefits. And while James claimed that the Government misrepresented that it offered her a lesser position with current salary as an alternative to her seeking disability, the record shows that James informed the Benefits Board that her salary would be slightly lower if she accepted the lesser position. The Board's decision to deny James a disability pension despite the discrepancy

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[1] Although these events occurred after James left the workplace, post-employment injuries can be actionable under Title VII. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 339, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (holding that the term "employees," as used in Title VII's anti-retaliation provision, includes former employees bringing suit for retaliatory, post-employment actions, such as a negative reference to a potential employer).

shows that the Government's "misrepresentation" did not affect the Board's decision. Thus, James suffered no adverse employment action via the alleged misrepresentation or cancellation.

James also failed to show that her family's insurance was cancelled. The testimony showed that an insurance company (not the Government) sent James a letter cancelling her family's health insurance. However, the letter was a mistake and the insurance was never cancelled.

The closest James came to establishing an adverse employment action was when she alleged that the Government reduced her service pension. Prior to James' retirement, John Kennedy, the Government's Assistant Director of Human Resources, provided James a chart showing that her pension would be $1,803.66 per month if she ended her service on March 1, 2003, at age 55 and a half. James ended her service at that time, but her monthly pension turned out to be $1,506.06. Although James contended that the smaller pension was evidence of retaliation, the chart plainly explained that any person who retired before reaching age 60 would have his or her pension reduced by 4% per year. Thus, James' pension was reduced to $1,506.06 per month because she retired early. It was not reduced due to retaliation. Even if the chart was somehow unclear or wrongly explained, James never contended that the Government used the chart to fraudulently induce her retirement and she never argued that she detrimentally relied on the chart.

### *B. Severe or Pervasive Retaliatory Harassment by a Supervisor*

Alternatively, James argues that the jury could have returned a verdict in her favor based on severe or pervasive retaliatory conduct. Evidence of severe or pervasive supervisor harassment following a discrimination complaint can constitute retaliation for purposes of Title VII. *See Morris,* 201 F.3d at 792. The standard for severe or pervasive harassment is the same in the retaliation context as in the sexual and racial discrimination contexts. *Akers v. Alvey,* 338 F.3d 491, 498 (6th Cir. 2003) (citation and quotation marks omitted). Under this standard, the harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* (citing *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). "[T]his test has both an objective and a subjective component: the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as hostile or abusive." *Id.* (citation omitted).

The *Morris* decision provides context for the "severe or pervasive harassment" standard. There, plaintiff Judy Morris filed a sexual harassment complaint against her supervisor, Brent Likins, for sexual harassment. *See Morris,* 201 F.3d at 787. In retaliation, Likins began calling Morris and visiting her workplace to harass her. He drove to her office building on several occasions and sat in his truck looking in her work window, "making faces at her." *Id.* at 793. Once, he even followed her home from work, drove up to her mailbox, and gave her "the finger." *Id.* He destroyed the television Morris watched at work,

and threw roofing nails on her home driveway several times. In light of those facts, this Court held that "a reasonable juror could conclude that Likins's behavior after the lodging of Morris's complaint constituted severe or pervasive retaliatory harassment." *Id.*

The only evidence James offers to show "severe or pervasive harassment" is the Government's opposition to her disability benefits application and "cancellation" of her health insurance. Because the Government was not responsible for the mistaken cancellation letter James received, the only action James can complain about is the Government's opposition to her benefits application. That opposition is not even close to the conduct present in *Morris*. Thus, as an objective matter, the Government's opposition to James' benefits application was not "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment."

## IV. CONCLUSION

James did not present evidence sufficient for a jury to find in favor of her retaliation claim. We therefore REVERSE the district court's decision to deny the Government's Rule 50 motion and remand for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | | |
|---|---|---|
| MARALYN S. JAMES | ) | |
| | ) | |
| v. | ) | NO. 3:02-0428 |
| METROPOLITAN GOVERN- | ) | JUDGE CAMPBELL |
| MENT OF NASHVILLE/ | ) | |
| DAVIDSON CO. | ) | |

ORDER

(Filed June 17, 2004)

Pending before the Court is Defendant's Motion to Alter or Amend, or in the Alternative, Motion for New Trial (Docket No. 165). Defendant's Motion is DENIED.

In considering a motion under Fed. R. Civ. P. 59, the Court should not disturb a jury's verdict as long as it is based upon sufficient evidence and was reasonably reached. *Chandler v. Specialty Tires of America, Inc.*, 283 F.3d 818, 824 (6th Cir. 2002). The Court finds that there was sufficient evidence at trial to support the jury's verdict.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

**JUDGMENT IN A CIVIL CASE**

(Filed May 17, 2004)

| | | |
|---|---|---|
| MARALYN S. JAMES | ) | |
| | ) | |
| VS. | ) | CASE #: 3:02-0428 |
| METROPOLITAN GOVERNMENT OF NASHVILLE/ DAVIDSON COUNTY | ) | Judge Campbell |

• **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

◦ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury returned a verdict in favor of the plaintiff, Maralyn James. The jury determined that the defendant retaliated against the plaintiff in violation of Title VII and awarded the plaintiff compensatory damages in the amount of $42,000.00.

Thereupon the jury was polled and each juror affirmed the verdict as being his or her individual verdict.

May 17, 2004
DATE

KEITH THROCKMORTON,CLERK

BY DORIS E. BUSH
DEPUTY CLERK

No. 04-5874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| MARALYN S. JAMES,<br>Plaintiff-Appellee,<br>v.<br>METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY NASHVILLE PUBLIC LIBRARY,<br>Defendant-Appellant. | ) | ORDER<br>(Filed Apr. 14, 20046 |

**BEFORE**: GILMAN and COOK, Circuit Judges; and MILLS,* District Judge,

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

---

*Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

**ENTERED BY ORDER OF THE COURT**
/s/ Leonard Green
Leonard Green, Clerk
[/s/ Illegible]

***42 U.S.C. § 2000e-3.*** **Other unlawful employment practices**

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(2)

No. 06-81

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

MARALYN S. JAMES,

*Petitioner*,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY NASHVILLE PUBLIC LIBRARY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## STATEMENT OF PROCEEDINGS[1]

The Complaint in this matter was filed on April 30, 2002. (Jt. Apx. p. 18). The Complaint alleged discrimination under the Americans with Disabilities Act, under the Age Discrimination in Employment Act, and retaliation. (*Id.*) In June 2003, the Metropolitan Government was granted summary judgment on the disability and age discrimination claims. (Jt. Apx. pp. 47, 59). The retaliation allegations remained. (Jt. Apx. p. 59).

The jury trial on this matter was held regarding the retaliation allegations in May 2004. (Jt. Apx. pp. 69, 235). The Metropolitan Government moved for judgment as a matter of law after the Petitioner presented the majority of her proof[2] and at the conclusion of all proof (both motions were denied). (Jt. Apx. pp. 495, 498).

The jury rendered a partial verdict in favor of Petitioner (finding retaliation by defendant but not finding a hostile

---

1. Petitioner Marilyn James will be referred to as "Petitioner." The Metropolitan Government of Nashville and Davidson County will be referred to as "Defendant" or the "Metropolitan Government." The Sixth Circuit Court of Appeals will be referred to as the "Sixth Circuit" or "Court of Appeals." The Petition for a Writ of Certiorari will be referred to as the "Petition." Citations to the Record will be made in one of two ways. Those items that are included as appendices to the Petition will be referred to as (Petition, Appendix __). Citations to items not so included in the Petition will be made to the Joint Appendix on file with the Clerk of the Sixth Circuit and designated as (Jt. Apx. __).

2. Plaintiff presented additional witnesses, taken out of order due to scheduling conflicts, after defendant began putting on its case in chief.

work environment or constructive discharge) and awarded compensatory damages in the amount of Forty Two Thousand ($42,000) Dollars. (Petition, Appendix 13). The Metropolitan Government filed a Motion to Alter or Amend, or in the Alternative, Motion for New Trial, which was denied in June 2004. (Jt. Apx. pp. 236, 280).

In December 2005, the Sixth Circuit reversed the district court's decision to deny the Metropolitan Government's motion for judgment as a matter of law. (Petition, Appendix 1). The Sixth Circuit denied Petitioner's petition for rehearing en banc or panel rehearing on April 14, 2006. (Petition, Appendix 15).

Petitioner filed her petition for a writ of certiorari in the U.S. Supreme Court on July 13, 2006.

## SUMMARY OF ARGUMENT

The Metropolitan Government opposes Petitioner's petition for certiorari and her request for remand to the Sixth Circuit for reconsideration under *Burlington Northern & Santa Fe Railway Co., v. White*, 126 S. Ct. 2405 (June 22, 2006). There is no need to remand this case because the complaints Petitioner made against her employer are not, as a matter of law, employment decisions that would have "dissuaded a reasonable worker from making or supporting a charge of retaliation."

This Response will cite relevant Seventh and District of Columbia Circuit cases (*Burlington* explicitly stated that it was choosing the standard used by these Circuits to determine what constitutes retaliation) to show that the denial of a lateral transfer, poor performance evaluations, the imposition of

work goals prior to any protected activity occurring, and the denial of Petitioner's disability pension by an independent board are not adverse actions that can support a retaliation claim. For these reasons, there is no need to remand for reconsideration because the Metropolitan Government is still entitled to judgment as a matter of law.

## RELEVANT FACTS

This retaliation suit was brought by Petitioner against her employer, the Nashville Public Library (a department within the Metropolitan Government) after the Library finally insisted, after six years of poor performance evaluations and warnings, that she improve her job performance. (Petition, Appendix 2).

Beginning in 1996 (long before she made an internal complaint of a hostile work environment), her supervisors began informing her in her annual evaluations that she must improve the speed of her work. (*Id.*) For instance, her 1999 evaluation noted that she was cataloguing "just over 2 titles per hour (as opposed to the 7-8 per hour expected) . . . Continued low output in terms of her primary job responsibility is not acceptable and will have serious consequences if the situation is not corrected." (*Id.*) The performance evaluations from 1996 through 2001 consistently criticized her output and she knew she was not cataloguing materials as quickly as her coworkers. (*Id.*)

On October 3, 2001, Petitioner was upset over being asked to catalogue a collection of books by a deadline that she felt was unfair, and so delivered a letter to Library Director Donna Nicely alleging that she was subject to a "hostile work environment" created by her immediate supervisor, Linda Neff. (*Id.*)

At the end of this year, Petitioner's poor performance caused her to fail an annual evaluation. (Petition, Appendix 3). Petitioner then filed an EEOC charge against the Library. (*Id.*) Around this time, Petitioner asked for a lateral transfer to an audio visual Librarian II position. (*Id.*) She was not selected for this job. (*Id.)*

By April 1, she had not met the goal she had been given of cataloguing an average of 6 items per hour - but she was not disciplined, demoted or terminated. (*Id.*) Instead, she was given more time to improve, was offered techniques to improve her output, and the Library accommodated her request that she be allowed to adjust the lights around her computer and obtain special computer glasses. (*Id.*)

Petitioner was scheduled for a re-evaluation on May 16, 2002. (Petition, Appendix 4). However, on May 13, 2002, she began taking sick leave when her physician informed the Library that she could not meet the goals set for her. (*Id.*)

Around this time, the Library attempted to accommodate her physician's concerns about stress and meeting goals by offering Petitioner a Librarian I position. (*Id.*) This position was a step down in title – it was a Librarian I job. However, for several months this Librarian I position would pay more than plaintiff's Librarian II position. (Jt. Apx. pp. 182, 298-300). Then it would slightly decrease to pay less than a Librarian II position; and after about 1 ½ years, the pay would change again so that the Librarian I job paid more than a Librarian II position. (Jt. Apx. p. 182). After a few more months it would go back down below the Librarian II salary. (*Id.*) Petitioner was given credit for her seniority by being placed at a high position in the series of "steps" for salaries within the Librarian I classification. (Jt. Apx. p. 299).

This job was offered to Petitioner as an accommodation, because it was a job that her physician had indicated she could do (her doctor had advised that she limit stress and work at a job without quotas for production). (Jt. Apx. pp. 298-299, 307-310). The job would not have had any supervisory or lead responsibilities that might create stress on Petitioner. (*Id.*) Petitioner testified that she could have done this job. (Jt. Apx. p. 432).

Petitioner did not take the job, instead choosing to apply for a disability pension. (Petition, Appendix 4). Petitioner claimed the government misrepresented to the Benefit Board that the Librarian I salary would be the same, however, she herself informed the Benefit Board that her salary would be slightly lower with the Librarian I position. (*Id.*) Therefore the Benefit Board was fully aware of the salary issues.

The Benefit Board, after considering Petitioner's application and arguments, did not grant her a disability pension. (*Id.*) Petitioner then took an early service pension. (Petition, Appendix 5).

## REASONS FOR DENYING THE PETITION

### A. There Is No Need To Remand For Reconsideration Under The New *Burlington* Standard, Because Under This Standard For Retaliation, The Metropolitan Government Is Still Entitled To Judgment As A Matter Of Law.

#### 1. The *Burlington* standard still requires an injury or harm.

The U.S. Supreme Court's opinion in *Burlington Northern & Santa Fe Railway Co. v. White*, does not state that each and every slight felt by an employee now constitutes retaliation. 126 S. Ct. at 2405. To the contrary, the *Burlington* opinion holds that "the anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Id.* at 2414. The opinion goes on to state that "a plaintiff must show that a reasonable employee would have found the challenged action **materially** adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 2415 (emphasis added). The standard is intended to prohibit employer actions that are likely "to deter victims of discrimination from complaining to the EEOC." (*Id.*)

In choosing this standard, the U.S. Supreme Court explicitly stated that it was choosing the standard used by the Seventh and District of Columbia Circuits to determine what constitutes retaliation. The Court stated that

> We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In

> our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (quoting *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

**Burlington *at 2415***. Under the new *Burlington* standard, as applied by the Seventh and District of Columbia Circuits in the past, the Metropolitan Government is still entitled to judgment as a matter of law.

**2. Decisions of the Seventh and District of Columbia Circuits, applying the standard adopted by the Supreme Court in *Burlington*, show that Petitioner's allegations of wrongdoing do not constitute retaliation.**

A summary of Petitioner's allegations of adverse actions against her are as follows:

- denial of lateral transfer
- bad employment evaluations
- impositions of cataloguing goals
- denial of her disability pension

(Petition, Appendix 7).

A review of the decisions by Seventh and District of Columbia Circuits, made prior to the *Burlington* decision but using that standard, shows that these allegations, as a matter of law, are not employment actions that can constitute retaliation.

These Circuits have made clear that every potentially objectionable action by an employer does not constitute an adverse action that can support a retaliation claim:

> We therefore agree with several other circuits that in order to support a claim of retaliation a plaintiff must demonstrate the "employer's challenged action would have been material to a reasonable employee," which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Washington*, 420 F.3d at 662; *see, e.g., Manning v. Metropolitan Life Ins. Co., Inc.*, 127 F.3d 686, 692 (8th Cir. 1997) (**"not everything that makes an employee unhappy is an actionable adverse action**"); *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997) (dictum noting **"there is room for a *de minimis* threshold" in claims of retaliatory conduct**).

*Rochon*, 438 F.3d at 1219-1220. And the Seventh Circuit has ruled that an adverse employment action is not every action, but "might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat. Bank and Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993).

In its *Washington* decision, the Seventh Circuit took pains to explain that a complaint of retaliation arising from retaliatory action or actions at the workplace must show that the action had a material adverse or effect on employment, but that an allegation of retaliation occurring outside the workplace, causing an IRS audit for example, could not be expected to depend on any adverse employment action. *Washington*, 420 F.3d at 660-661. Following that reasoning the *Washington* Court further explained that although recent decisions of other panels on retaliation cases in the Seventh Circuit used the term "adverse employment action," they should be understood to primarily refer to the "materiality" requirement applicable to any action. *Id.* at 662-663.

A review of the Seventh and Ninth Circuit decisions regarding adverse actions shows that, under the *Burlington* standard, the Metropolitan Government is entitled to judgment as a matter of law in this case.

**a. The Denial of A Lateral Transfer Does Not Constitute An Adverse Action.**

The denial of a lateral transfer does not constitute an adverse action that can support a retaliation claim. The D.C. Circuit held this in a case involving a bank employee who alleged she was retaliated against when her employer reassigned her to a job she thought was undesirable, and later was not selected for a position she did find desirable. *Brown v. Brody*[3], 199 F.3d 446 (D.C. Cir. 1999). In that case the D.C. Circuit stated that:

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3. *Brown v. Brody* was cited with approval by *Rochon*, 438 F.3d at 1219, one of two cases that the U.S. Supreme Court explicitly cited as an example of the new *Burlington* standard for retaliation. *Burlington* at 2415.

> **A plaintiff** who is made to undertake or **who is denied a lateral transfer that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury** unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm. **Mere idiosyncrasies of personal preference are not sufficient to state an injury**.

*Id.* at 457 (emphasis added).

**b. Poor Employment Evaluations Do Not Constitute An Adverse Action.**

Poor employment evaluations do not constitute an adverse action that supports a retaliation claim. The Seventh Circuit Court of Appeals made this ruling in a case involving a university employee who alleged retaliation, shown by a poor performance evaluation and other actions, after she reported sexual harassment. *Whittaker v. Northern Illinois University*, 424 F.3d 640 (7th Cir. 2005). The Seventh Circuit stated that:

> **While Whittaker's negative evaluation, written warnings, and placement on "proof status" are putatively disciplinary measures, none "result[ed] in tangible job consequences and therefore are not adverse employment actions actionable under Title VII."** *Longstreet v. Ill. Dept. of Corrections*, 276 F.3d 379, 384 (7th Cir. 2002)(holding that plaintiff's "negative performance evaluations and being required to substantiate that

> her absences from work were illness-related . . . did not result in tangible job consequences and therefore are not adverse employment actions actionable under Title VII"); ***Oest v. Ill. Dept. of Corrections*, 240 F.3d 605, 613 (7th Cir. 2001)(holding that neither "unfavorable performance evaluations" nor "oral or written reprimands" constitute adverse employment actions under our case law).**

*Id.* at 647-648 (7th Cir. 2005) (emphasis added).

The reasoning behind this holding is that there were no negative consequences for the plaintiff as a result of her negative evaluation. *Id.* at 648. "Typically, adverse employment actions are economic injuries." *Markel v. Board of Regents of University of Wisconsin System* 276 F.3d 906, 911 (7th Cir. 2002). "[T]he adverse action must materially alter the terms and conditions of employment." *Stutler v. Illinois Dept. of Corrections*, 263 F.3d 698, 703 (7th Cir. 2001). The terms and conditions of Whittaker's employment, however, were never altered as a result of her poor evaluations. *Whittaker* at 648; also *Hottenroth v. Slinger*, 388 F.3d 1015, 1030 (7th Cir. 2004) ("It is well established that unfulfilled threats that result in no material harm cannot be considered an adverse employment action under Title VII").

The D.C. Circuit has also held that a poor employment evaluation does not constitute an adverse employment action in a retaliation case. *Brown*, 199 F.3d at 458. The D.C. Circuit ruled that

> Just as lateral transfers do not ordinarily constitute "adverse actions," a similarly thick body of precedent

> . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions.

(*Id.*) In that case also, the reasoning was related to the fact that the employee's poor evaluation did not have any consequences (did not affect her grade or salary). (*Id.*)

### c. The Imposition of Cataloguing Goals, Prior To Any Protected Activity Does Not Constitute An Adverse Action.

The "imposition" of hourly cataloguing goals as complained of by Petitioner cannot constitute an adverse action that can support a retaliation claim. In fact, as the Sixth Circuit correctly stated in its recitation of the facts, the expectation or job requirement for cataloguing an average of 7-8 book titles per hour was in place at least as early as 1999. (Petition, Appendix 2). Petitioner's performance evaluation for that year noted that her average performance of 2 titles per hour was not acceptable in view of the job requirement. (*Id.*)

It is entirely accurate to say that Petitioner's first written protest over working conditions in October 2001 (her internal complaint made by letter to the Library Director), was a reaction to the Library's expectation that she meet these objective job requirements. (Petition, Appendix 2). Therefore, even if her October letter could be construed as protected activity, *the objective job requirement that she catalogue a certain number of books, and the series of warnings when she did not meet the requirement preceded her alleged protected activity by at least two years.*

Moreover, Petitioner's first clearly protected activity, the EEOC discrimination charge of January 29, 2002, came even later in time and after the Library gave her a failing performance evaluation, in December 2001, based on her failure to improve her speed at cataloguing book titles. (Petition, Appendix 3). Thus, Petitioner's apparent claim that the Library's enforcement of the "quota" for cataloguing followed her complaint of discrimination is simply wrong under the undisputed facts. (*See* Petition for Certiorari, p. 4).

The analysis recently adopted by this Court in *Burlington* requires an alleged retaliatory act to be materially adverse to a reasonable employee. *Burlington* at 2415. It determines materiality by adopting the Seventh Circuit's rationale of considering the deterrent effect of a contested action on a reasonable employee's exercise of a protected right. (*Id.*); *Rochon*, 438 F.3d at 1219-1220. It is logical to the point of being obvious that action taken prior to any protected activity cannot be the basis for a charge of retaliation both because there is nothing for the employer to retaliate against and because the employee was not deterred from protected activity. As this Court said in *Burlington* "Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title II complaint." *Burlington* at 2416. Petitioner's contention, then, regarding the "quota" is actually one of discrimination under 42 U.S.C. § 2000e-2(a) (not retaliation). However, the sole issue before this Court in the instant case is retaliation under 42 U.S.C. § 2000e-3(a).

The undisputed facts further support the correctness of the Sixth Circuit's decision because as that Court stated in early 2002 the Library actually **lowered** the requirement for Petitioner to an average of 6 catalogued titles per hour from

the 7-8 titles stated in 1999. (Petition, Appendix 4). Moreover, the Library made other accommodations to assist Petitioner in 2002. (Petition, Appendix 4). Therefore, even under the new *Burlington* standard, the Library's imposition of requirements or goals for cataloguing book titles and the expectation that Petitioner would meet those goals, all which occurred prior to any protected activities, cannot form the basis for a claim of retaliation.

**d. The Denial of Petitioner's Application For A Disability Pension Cannot Constitute Retaliation.**

In another exaggeration, Petitioner contends that the Library retaliated by fighting her application for disability benefits (often called a pension) with a "vengeance" and thereby caused the Benefit Board to deny it. (Petition for Certiorari, p. 5). The undisputed proof is that the Benefit Board is a board or agency within the Metropolitan Government that has the final, independent authority to determine whether an employee is medically eligible for disability benefits and to grant or deny an application. (Jt. Apx. pp. 446-454). Petitioner attempts to cast the Benefit Board as nothing more than a rubber stamp for the wishes of a department, but the proof is that the Benefit Board is legally required to function independently of an employing department. (Jt. Apx. p. 449). Moreover, the Library's supposedly vengeful opposition consisted of answering questions posed by the Benefit Board. (Jt. Apx. pp. 449-451).

One of the factors the Benefit Board must consider is whether an employee is medically able to perform comparable work within the Metropolitan Government. (Jt. Apx. p. 453). The Library informed the Benefit Board of its offer of the

Librarian I position to Petitioner as an accommodation to Petitioner after receiving the reports of her personal physician. (Jt. Apx. pp. 298-299, 307-310). Although a lesser position, the Sixth Circuit correctly noted that the salary of the Librarian I position would have fluctuated both above and below Petitioner's Librarian II position. The Librarian I position was higher for three months, lower for 1 ½ years and then higher again. (Jt. Apx. pp. 182, 298-300). The only error the Sixth Circuit correctly attributed to the Library is that it's representatives did not go further in its answer than the first 3 months' salary. (Petition, Appendix 4). However, the Sixth Circuit stated that Petitioner provided corrected salary information to the Benefit Board prior to its decision to deny her application. (Petition, Appendix 8).

This Court's decision in *Burlington* does not mandate remand for reconsideration of this issue. Although the Sixth Circuit ruled that the Library's error or oversight was not an adverse employment action because it did not affect the Benefit Board's decision, it should also fail the materiality test for the same reason. It had no effect. Therefore, a reasonable employee would not be deterred from exercising a protected right by an ineffectual act or omission. *Washington*, 420 F.3d at 661-662.

Another reason against a remand is that the Sixth Circuit could have just as easily rejected this claim on the grounds that there is no causation between the alleged retaliatory act and any harm to Petitioner. The act or omission of the Library did not cause the Benefit Board to reject Petitioner's claim. Some degree of causation between the protected act and harm is necessary to support a claim of retaliation. *Clark County School Dist. v. Breeden*, 121 S. Ct. 1508, 1510 (U.S. 2001); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792

(6th Cir. 2000). Causation was not at issue in the Court's *Burlington* decision and, therefore, it has no effect on prior law.

**3. Applying the law to these facts, Petitioner never suffered any injury or harm under the Burlington standard.**

A review of the facts in this case show that Petitioner never suffered any injury or harm under the *Burlington* standard.

For example, the denial of her request for a lateral transfer to an audio visual Librarian II position (Petition, Appendix 3) is not an adverse employment action as a matter of law. *Brown*, 199 F.3d at 457.

Similarly, Petitioner's failure of an annual evaluation does not constitute an adverse employment action. *Whittaker*, 424 F.3d at 647-648; *Brown v. Brody*, supra. The reasoning that supported these holdings (that there were no negative consequences as a result of the poor evaluations) is found here also – even though Petitioner did not meet the goals set for her by her supervisors, she was not disciplined, demoted or terminated. (Petition, Appendix 3). Instead, she was given more time to improve, was offered techniques to improve her output, and the Library accommodated her request that she be allowed to adjust the lights around her computer and obtain special computer glasses. (*Id.*)

The imposition of cataloguing goals on Petitioner's work also does not constitute an adverse employment action, where she was given these goals long before she undertook any protected activity. *See Burlington* at 2415; *Rochon*, 438 F.3d

at 1211. These goals were set by at least 1999 and her first arguably protected activity (an internal complaint to the Library Director) took place in October 2001. (Petition, Appendix 2).

Finally, the denial of Petitioner's disability application does not constitute an adverse employment action, where the independent Benefit Board denied her disability pension. (Petition, Appendix 8). The action complained of, the Library's alleged failure to fully explain the salary fluctuation in the job offered to Petitioner, could not be an adverse employment action since it had no effect on the Board's decision (because Petitioner fully informed the Benefit Board, prior to its vote on her case, of the salary fluctuation). This denial could not be an adverse action where an act taken had no effect. *Washington*, supra at 661-662; *Brown*, 199 F.3d at 458. In addition, the fact that there was no causation between the denial of the disability pension and the Library's action also prevents this case from meeting the standard for a *prima facie* case of retaliation. *Clark County School Dist.*, 121 S. Ct. at 1510.

When the law of the new *Burlington* standard is applied to the facts of this case, the Metropolitan Government is still entitled to judgment as a matter of law. For these reasons, respectfully, there is no need to remand this case back to the Sixth Circuit for reconsideration under *Burlington*.

## CONCLUSION

There is no need to remand this case because the complaints Petitioner made against her employer are not, as a matter of law, employment decisions that would have "dissuaded a reasonable worker from making or supporting a charge of retaliation." For these reasons the Metropolitan Government respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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